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In the

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION, EDWARD J. MILLER,
and JEFFREY D. MACEK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner incorporates by reference the Corporate Disclosure Statement included in its Petition for Writ of Certiorari filed May 10, 2006.

TABLE OF CONTENTS

Rule 29.6 Statement i

Table of Authorities iii

Reply to Brief in Opposition 1

I. The Ninth Circuit's Decision Below Creates a Circuit Split 2

II. The Ninth Circuit's Decision Below Destabilizes ERISA Law in the Ninth Circuit 4

III. The Ninth Circuit's Decision Below Ignores the Structure of ERISA 6

Conclusion 10

TABLE OF AUTHORITIES

CASES

Am. Flint Glass Workers Union v. Beaumont Glass Co., 62 F.3d 574 (3d Cir. 1995) 1
Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 3–4
Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 1, 3–4
Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961) 6
Jones v. United States, 527 U.S. 373 (1999) 6
Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 3–4
Malia v. General Electric Co., 23 F.3d 828 (3d Cir. 1994) 2–3, 6
Pegram v. Herdich, 530 U.S. 211 (2000) 10
Sutter v. BASF Corp., 964 F.2d 556 (6th Cir. 1992) 2–3

STATUTES

29 U.S.C. § 1058 ..... 2, 6–7
29 U.S.C. § 1341 ..... 1, 6–8
29 U.S.C. § 1412 ..... 1, 7–8

MISCELLANEOUS

California Legal Forms—Transaction Guide § 1D.52 (Matthew Bender 2006) 5

REPLY TO BRIEF IN OPPOSITION

Crown's argument is simple. As this Court has repeatedly explained, an employer's decision to adopt, modify, amend, or terminate a pension plan is not subject to fiduciary duties under ERISA. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). Merger is a form of *amending* a pension plan, while annuitization and lump-sum distribution are both methods of *terminating* a plan. Mergers and terminations are evaluated according to separate concerns, as different actuarial assumptions govern whether a plan is adequately funded on a termination basis as opposed to an ongoing basis. *See Am. Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574, 577 n.4 (3d Cir. 1995). Proposed mergers and terminations are governed by distinct statutory frameworks: merger must only guarantee the short-term protection of pension benefits, while termination must completely satisfy all outstanding benefit claims. *Compare* 29 U.S.C. § 1341 *with* 29 U.S.C. § 1412. Merger is therefore an *alternative to*, not a *method of*, termination, and the decision between the two alternatives does *not* implicate fiduciary duties.

The decision below replaces this rule with a declaration that "anything not forbidden is compulsory": the fact that employers *may* choose to merge pension plans mandates that employers therefore *must* contemplate merger when considering termination. The Ninth Circuit's logic contradicts holdings of this Court and other federal circuits establishing that merger is an *alternative* to a standard termination, and that the decision between merger and annuitiza-

tion is *not* subject to fiduciary duty. This Court should therefore grant Crown's petition for writ of certiorari in order to resolve the now-present circuit split and restore the proper understanding of ERISA's fiduciary duty obligations.

I. THE NINTH CIRCUIT'S DECISION BELOW CREATES A CIRCUIT SPLIT.

Notwithstanding PACE's arguments to the contrary, Br. in Opp. at 8–10, the decision below squarely conflicts with *Malia v. General Electric Co.*, 23 F.3d 828 (3d Cir. 1994) and *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992). *Malia* and *Sutter* are both fundamentally predicated on the categorical understanding that merger is an *alternative to*, not a *method of*, termination.

For example, the *Malia* court expressly compares the entitlements protected during merger with entitlements guaranteed during termination: a necessary analysis, as ERISA defines the former by reference to the latter. 23 F.3d at 831–32 (quoting 29 U.S.C. § 1058). These comparisons would be tautological and meaningless if, as the Ninth Circuit has held, merger is a *method of* termination. *See also id.* at 832 (discussing difference between "hypothetical termination" and "actual termination" in context of validity of merger).

The *Malia* court further states (*after* the passage quoted in Br. in Opp. at 8) that employers have *no* fiduciary duties when considering whether to implement a merger. 23 F.3d 833 This rule brooks no exceptions—merger simply is *not* a fiduciary adminis-

trator decision. *Sutter* adopts a similar categorical rule: merger decisions do not trigger fiduciary obligations because they relate to "the establishment or amendment of a pension plan," not the termination thereof. *See* 964 F.2d at 561–62. The Ninth Circuit's conclusion that Crown violated its fiduciary duties by failing to consider the proposed merger when terminating its plans squarely conflicts with the Third and Sixth Circuits' views.

The categorical view adopted in *Malia* and *Sutter* is amply supported by this Court's prior decisions. In a series of cases, this Court has made clear that the decision to adopt, modify, amend, or terminate a pension plan is not subject to fiduciary responsibilities. *Hughes*, 525 U.S. at 444; *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Merger is form of plan amendment. *Sutter*, 964 F.2d at 562. Therefore, employers have no fiduciary duties when considering a merger proposal: the Ninth Circuit's decision contradicts *Hughes*, *Lockheed*, and *Curtiss-Wright*.

PACE's denial of this contradiction is unpersuasive, and ultimately supports Crown's argument. According to PACE, the decision below does not conflict with decisions of the other circuits because in *Malia* and *Sutter*, "[t]ermination was never an issue," and "no administrator function was involved." Br. in Opp. at 8–9. This is of course true—because, as Crown has explained, termination is *never* an issue when considering merger, and administrator functions are *never* implicated by merger decisions. "The cases cited by petitioner do not deal with termi-

nation procedures," Br. in Opp. at 9, *because* they deal with merger—which the other circuits maintain is a different process. Only the Ninth Circuit has claimed otherwise. PACE's grounds for distinction only prove Crown's point: that the Ninth Circuit has contradicted its sister circuits.

PACE has not offered a single case supporting the Ninth Circuit's novel view that merger is a form of termination. Meanwhile, the Ninth Circuit's decision conflicts with the Third and Sixth Circuit's treatment of mergers and terminations, and conflicts with this Court's prior holdings. As in *Hughes* and *Lockheed*, this Court should grant certiorari in order to resolve the latest circuit split generated by the Ninth Circuit's novel construction of ERISA. *See* 525 U.S. at 438 (certiorari granted because Ninth Circuit finding of fiduciary duty conflicted with *Lockheed* and sister circuits); 517 U.S. at 890–91 & n.4 (noting conflict between Ninth Circuit finding of fiduciary duty and logic of *Curtis-Wright* as applied by sister circuits).

II. THE NINTH CIRCUIT'S DECISION BELOW DESTABILIZES ERISA LAW IN THE NINTH CIRCUIT.

PACE asserts that merger-as-termination questions rarely arise. *See* Br. in Opp. at 4. That was true enough until this case, which changed the law in the Ninth Circuit. The Ninth Circuit's holding *requires* a course of conduct previously considered *unthinkable* by ERISA practitioners: whenever a plan sponsor undertakes to terminate a plan, the sponsor now has a fiduciary duty to fully consider merger as

means of termination if such a suggestion is made, which must be expected to occur in virtually all instances of termination. Now that the plan sponsor decision of whether or not to merge a pension plan has been transformed into a fiduciary determination of termination procedures, employers will be forced to either carefully sift through unsolicited and unwarranted merger proposals (lest they be accused of violating their fiduciary responsibilities), or to abandon the efficiency gained by serving as both plan sponsor and plan administrator. *See, e.g.*, *California Legal Forms—Transaction Guide* § 1D.52 (Matthew Bender 2006) (citing Ninth Circuit's decision below for proposition that company directors ought *not* to serve as plan administrators).

In response to Crown's argument that the Ninth Circuit decision places the benefits of plan participants at risk, PACE asserts that the argument "verges on the absurd." Br. in Opp. at 17. Nevertheless, the PBGC made that precise argument to Ninth Circuit when urging rehearing en banc. *See* PBGC Amicus Curiae Br. at 4 (under a merger, "benefit liabilities remain unsatisfied promises, and participants continued to be at risk that they will not receive their full benefits, depending on a plan's funding levels."). In termination by purchase of an annuity, plan members immediately receive their benefits—in the form of the annuity—whereas merger merely represents the continuation of a promise to pay. Merger simply does not *guarantee* plan benefits.

III. THE NINTH CIRCUIT'S DECISION BELOW IGNORES THE STRUCTURE OF ERISA.

PACE, like the Ninth Circuit, rests its argument that termination may be effected by merger on 29 U.S.C. § 1341(b)(3)(A), which provides that "in connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection," the plan administrator shall either "(i) purchase an irrevocable commitment from an insurer to provide all benefit liabilities under the plan, or (ii) . . . otherwise fully provide benefit liabilities under the plan." PACE argues here, and the Ninth Circuit held below, that the words "otherwise fully provide" leave open the possibility of merger as a method of plan assets. *See* Br. in Opp. at 21.

This wooden literalism focuses on a single statutory phrase and ignores the context of ERISA's structure. Statutory language "must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Merger and termination are different processes, defined by separate sections of ERISA and designed to serve divergent purposes. *See* Pet. at 17–23. Federal law goes so far as to define the two by contrast to each other: a merger's validity under 29 U.S.C. § 1058 is predicated on whether the post-merger plan, were it immediately terminated, would grant each participant the same benefits as would a termination of the pre-merger plan. *See Malia*, 23 F.3d at 831–32. If merger is a

form of termination, this statutory framework is nonsensical.

The entire point of termination is finality: termination ends a plan's existence for ERISA purposes. The plan's benefits leave the ERISA framework, secured by an external source guaranteeing long-term stability. The employer has no further ongoing obligations. The PBGC is no longer involved in overseeing the plan. Former plan participants need not worry about their benefits deteriorating after poor decisions by plan administration.

Merger achieves none of these results. Instead, merger's only guarantee is of short-term equivalency: the termination value of a plan immediately after a merger must surpass or equal the termination value of the plan immediate before merger. 29 U.S.C. § 1058; *see also* 29 U.S.C. § 1412(b). The long-term stability of a merged plan hinges on continual plan management and oversight—the very thing that "termination" is supposed to end. Merger therefore cannot be said to satisfy 29 U.S.C. § 1341(b)'s requirement that a termination "fully provide all benefit liabilities," because merger does not provide the long-term guarantee of full benefit protection achieved through annuitization or lump-sum disbursement.

PACE's response—that annuities are not risk-free, and therefore that merger is a form of termination—is unsupportable. *See* Br. in Opp. at 17, 19–23. *First*, as PACE concedes, merger does not actually *terminate* a plan. Br. in Opp. at 20. Although benefits under a termination annuity and benefits under

an ongoing plan are both paid out over time, the absence of an ongoing ERISA-regulated plan is a critical distinction between the two.

Second, merger simply does not provide the degree of long-term security that annuitization or lump-sum distribution guarantees. Annuitization provides for the protection of all participant benefits at the moment of termination, through the purchase of a fully-funded and reliable financial instrument. Lump-sum distribution achieves the same goal by transferring the entire value of the accrued benefit directly to the participant, at the moment of termination. Merger, by contrast, relies on the future management of an ongoing pension plan to provide future benefits. The guarantee that "no accrued benefit of a participant or beneficiary may be lower *immediately after* the effective date of a transfer or merger" cannot be said to fully guarantee such benefits through the future. *See* 29 U.S.C. § 1412(b) (emphasis added). Merger does not *prospectively* protect plan benefits, because the benefits are at the mercy of future plan administration.

Third, though annuities have a theoretical chance of insolvency, Br. in Opp. at 17, they nevertheless offer more security than ongoing pension plans. Section 1341 reflects the traditional, historical view of annuitization as a risk-free guarantee of future benefits—annuity instability is a recent development, far less prevalent than pension plan bankruptcy. Regardless, even if PACE's objections to annuitization were valid, § 1341 specifically approves of annuitization as a form of termination, while

PACE's merger-as-termination theory lacks any express statutory blessing.

The PBGC opinion letters relied upon by PACE are not to the contrary. *See* Br. in Opp. at 14–17, App. 6a–16a. Nothing prevents employers from *first* making the non-fiduciary decision to partially merge or split Plan A into Plan B, and *then* making the non-fiduciary decision to terminate the remains of Plan A. The PBGC Implementation Guidelines identified by PACE note that such two-step merger/termination processes will be carefully scrutinized to prevent abuse, while the Opinion Letters note a few cases in which a specific merger/termination process would be deemed acceptable.

These letters ultimately *support* Crown's argument that merger and termination are each plan sponsor decisions not subject to fiduciary duties. In each letter, the merger and termination are treated as separate non-fiduciary decisions: nothing in these letters establishes that a merger is a *form* of termination. Instead, the two-step plan is considered an attempt to *avoid* the rules governing proper plan termination. At most, the Opinion Letters establish that Crown *could* have elected to adopt PACE's merger proposal, but the fact that the process would be appropriate in some cases does not create a fiduciary obligation to consider it whenever it is offered.

PACE further obscures the merger/termination distinction by trying to stretch an employer's specific fiduciary-duties-as-administrator to cover *every* decision made by an employer who occasionally acts an administrator. Because the employer is wearing two

hats, PACE argues, it *always* is subject to its fiduciary duties to investigate proposed options. Br. in Opp. at 5–8. This assertion is untenable, as a sponsor can only wear one hat at a time: "the fiduciary with two hats *wear[s] only one at a time*, and wear[s] the fiduciary hat when making fiduciary decisions." *Pegram v. Herdich*, 530 U.S. 211, 225 (2000) (emphasis added). Because merger concerns plan structure or design, the plan sponsor simply does not wear its *fiduciary* hat when it makes a decision concerning merger.

CONCLUSION

For the reasons provided above and in the petition for writ of certiorari, this Court should grant the petition.

Respectfully submitted,

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